LLOYD D. SUDDER

IBLA 74-157 Decided June 14, 1974

Appeal from decision (Anchorage AA-3072) by Alaska State Office, Bureau of Land Management, rejecting application for homestead entry, homestead final proof, and denying petition for reinstatement of homestead entry.

Reversed and remanded.

1. Alaska: Land Grants and Selections--Alaska: Homesteads --Applications and Entries: Generally--State Selections

   An amendment to a pending blanket state selection will not be construed under the rule of Udall v. Kalerak, 396 F.2d 764 (1968), to include a tract of land not described where the State has specifically excluded that tract from its selection and never reinstated its application as to it.

2. Alaska: Homesteads

   A settlement claim otherwise proper is not adversely affected by the rejection by the State Office of a notice of location.

APPEARANCES: Lloyd D. Sudder, pro se.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Lloyd D. Sudder has appealed to this Board from a decision dated September 21, 1973, of the Alaska State Office, Bureau of Land Management, which rejected his application for a homestead entry, AA-3072, and his final homestead proof and denied his petition to reinstate his homestead entry. The facts are not in dispute.

On July 27, 1968, Lloyd D. Sudder filed a notice of location of a homestead settlement claim on unsurveyed lands in what would be, when surveyed, the NE 1/4 sec. 35, T. 16 N., R. 1 E., S.M., Alaska. The land, described by metes and bounds, was covered at that time by a homestead settlement claim of Ahti A. Alquist.

Another possible conflict was a State of Alaska mental health selection, A-055409. As originally filed the state selection did not cover the land in Sudder's claim. It was amended on August 14, 1963, by letter dated August 12, 1963, stating:

> The State of Alaska hereby requests that its application be amended to include the following described lands:
>
> T. 16 N., R. 1 E., Seward Meridian. * * *
>
> It is the state's intent by this blanket filing to cover all available lands excluding any prior valid rights, claims or patented lands. The State's filing is not intended to attach in case a valid entry is relinquished and subsequently filed upon. 1/

In a letter dated May 19, 1965, to Mrs. Alquist, the Director, State of Alaska, Department of Natural Resources, wrote:

> Your protest to the State selection has been received. Our selection appears to encroach upon the area you have claimed.
>
> We are glad to say it is not the State's Policy to attempt to "jump" anyone's legal claim and we are pleased that you have made your claim known to us. We do not wish in anyway to interfere with your efforts in development of Alaska's resources.
>
> We are sending a copy of this letter to the Bureau of Land Management to advise them that your claim should be excluded from our selection.

On May 4, 1966, the State further amended A-055409 to include some 710 acres of land in secs. 26, 27, 28, 33, and 34, T. 16 N., R. 1 E., S.M., which had formerly been in a withdrawal. Thus, although the State did amend its application, the amendments did not relate to the land in issue.

1/ In a letter dated March 1, 1966, the State retracted the last sentence from all its blanket selection applications, see State of Alaska, 6 IBLA 58, 79 I.D. 391 (1972).

The 5-year statutory life of Alquist's entry expired on May 19, 1968. Sec. 1, Act of May 14, 1898, as amended, 43 U.S.C. § 270-7 (1970). Upon his failure to respond to a notice of June 3, 1968, reminding him that final proof must be filed, his claim was canceled and the records noted on September 11, 1968.

On July 29, 1968, Sudder filed a notice of settlement, giving that day as the date of occupancy.

In a decision dated October 27, 1971, the State Office held his notice of location unacceptable for recordation on the ground that the land was segregated from all appropriation because of the State selection.

Sudder asserts he never received this decision and that he did not learn of it until sometime in 1973 when he visited the State Office to inquire about final proof. On July 27, 1973, he filed a request for reinstatement of his entry and final proof.

The State Office held that the Alquist settlement on unsurveyed land and the filing of a notice of location did not segregate the land, but that segregation would result only if Alquist initiated and maintained his claim in accordance with a requirement of the homestead law. It noted that Alquist had apparently initially complied with the homestead law but at any time that his compliance lapsed, the entry became open to other appropriation. Thus, it reasoned, while the Alquist claim segregated the land at least through the State's recognition of his claim in 1965, Alquist apparently abandoned the claim shortly thereafter. As a result, when the State amended its selection on May 4, 1966, to include land not in sec. 35, it reasserted its interest in all the land covered by the selection up to that time including the Alquist entry. The State selection, therefore, became effective as to the "Alquist" land on that date. As a result, it went on, the land was segregated from other appropriation from that day on and has never been open to settlement. Accordingly, the State Office concluded that Sudder could not have initiated a homestead claim to the land by settlement and had not established any rights to the land. It also pointed out that on December 18, 1971, the lands in T. 16 N., R. 1 E., S.M., were withdrawn for selection by the village of Eklutna by the Alaska Native Claims Settlement Act. 43 U.S.C. § 16 (Supp. II, 1972) and again by PLO 5184. Both of these withdrawals are subject to "valid existing rights."

On appeal Sudder asserts that he resided on the land for five years and complied with all the requirements of the homestead law; that State Office employees told him in 1968 that the land was open to settlement; the land office records showed the land

as open; at a later date the plat showed his homestead; and the May 4, 1966 amendment to the State Selection did not describe any land in sec. 35 where his homestead is located.

Since Sudder filed his notice of settlement on July 1968, and alleges that he resided on the entry from July 29, 1968 to July 27, 1973 (the date he filed final proof), the withdrawals are of no effect on his entry provided he established his rights prior to them. Similarly, if the Alquist claim was not properly maintained, it did not close land to another settlement claim. Vernard E. Jones, 76 I.D. 133, 137 (1969).

The only apparent obstacle to his having a valid entry is State selection A 055409. As we have seen, the State amended its application in 1965 to exclude the land in Sudder's (then Alquist's) entry. It then amended its application on May 4, 1966, to include additional lands within the same township. In holding that the amendment had the effect of reasserting the State's selection to all of the lands in the township, the State Office relied upon Udall v. Kalerak, 396 F.2d 746 (9th Cir. 1968), cert. denied, 393 U.S. 1118 (1969), (affirming State of Alaska, 73 I.D. 1 (1966)).

While Kalerak does hold that an amendment to a State selection, which might have been invalid as being prematurely filed, will be accepted as reaffirmation of the original filing and treated as though the State had refiled its original application at the time of its amendment, it considered only an application for lands as to which the State was maintaining an application. It did not hold that an amendment to a premature filing could be construed as reviving or validating an application to land which the State had deleted from its original premature application. The reasoning of Kalerak can apply only to lands to which the State has maintained an application, albeit a premature one.

Here, the State removed the lands in the Alquist entry from its selection in 1965 and never renewed its application for them. The 1966 amendment described other lands. Thus, when Sudder made his settlement and filed his notice of settlement in July 1968, the land in his entry was open to settlement. 2/ Consequently, his notice of settlement should have been accepted for recordation. That it was not, in no way affects the rights

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2/ There is also the question of whether the State's original selection excluding lands in valid existing claims removed the "excluded" lands from the selection not only while such "claim" existed but even after it lapsed. Cf. Kenneth D. Makepeace, Anchorage AA 706 (August 20, 1969), reversed and remanded by State of Alaska, supra; Dale Larry Hockzema, A-30470 (February 17, 1966).

gained by settlement and compliance with the requirements of the homestead law. His final proof should be processed in accordance with the regular procedure.

Therefore, pursuant to authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Office is set aside and the case is remanded to the Bureau of Land Management for appropriate action consistent herewith.

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Martin Ritvo
Administrative Judge

We concur:

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Frederick Fishman
Administrative Judge

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Joseph W. Goss
Administrative Judge